UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X----------X

ARTHUR BALDER,

Plaintiff,

v.

SUSAN SARANDON; DAVID SHARA; HONEY SHARA; TIGRAN TSITOGHDZYAN,

Defendants.

X----------X

Case No.: 1:22-cv-06401-JLR-SN

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

**ADELMAN MATZ P.C.**
**1159 Second Avenue, Suite 153**
**New York, New York 10065**
**Phone: (646) 650-2207**
***Attorneys for Defendants***

**TABLE OF CONTENTS**

I.THE TAC SHOULD BE DISMISSED UNDER THE PLAUSIBILITY STANDARD……..1

II.PLAINTIFF'S OPPOSITION DOES NOTHING TO SAVE HIS BREACH OF CONTRACT CLAIMS AGAINST DEFENDANTS..... 1

A. Plaintiff Has Failed to Plausibly Allege an Agreement with Sarandon..... 1

B. Plaintiff's Contract Claims Against Shara Also Fail..... 3

C. Plaintiff's Contract Claim Against Tigran Also Fails..... 7

III.PLAINTIFF HAS FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS..... 8

IV.PLAINTIFF STILL FAILS TO SUFFICIENTLY ALLEGE FRAUD..... 9

V.PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE BREACH OF FIDUCIARY DUTY……..11

VI.PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE PROMISSORY ESTOPPEL……..11

VII.PLAINTIFF FAILS TO ALLEGE COPYRIGHT INFRINGEMENT..... 12

VIII.PLAINTIFF STILL FAILS TO SUFFICIENTLY ALLEGE DEFAMATION..... 13

IX.PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE UNJUST ENRICHMENT..... 14

XI.PLAINTIFF STILL FAILS TO ESTABLISH THAT THE TAC SHOULD NOT BE DISMISSED WITH PREJUDICE..... 15

CONCLUSION..... 15

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Alvarado v. Mount Pleasant Cottage Sch. Dist.*,
404 F.Supp.3d 763 (S.D.N.Y. 2019) ..... 9

*Andrews v. Sony/ATV Music Publ'g, LLC*,
2017 WL 770614 (S.D.N.Y. 2017) ..... 5

*AT&T Corp. v. Syniverse Techs., Inc.*,
2014 WL 4412392 (S.D.N.Y. Sept. 8, 2014) ..... 3

*Austin Instrument, Inc. v Loral Corp.*,
29 N.Y.2d 124 (1971) ..... 6

*Banner v. Lyon & Healy, Inc.*,
249 AD 569, *affd*, 277 N.Y. 570 (1938) ..... 10

*Bell Atl. Corp. v Twombly*,
550 US 544, 127 S Ct 1955, 167 L Ed 2d 929 [2007] ..... 1

*Brinkley v. Casablancas*,
80 A.D.2d 428 (1st Dep't 1981) ..... 7

*Brooks v. 1st Precinct Police Dep't*,
2014 WL 1875037 (E.D.N.Y. May 9, 2014) ..... 5

*Cole v Blackwell Fuller Music Publ., LLC*,
(S.D.N.Y. Sept. 28, 2018) ..... 3

*Computech Intern., Inc. v. Compaq Computer Corp.*,
2002 WL 31398933 (S.D.N.Y. 2002) ..... 7

*Four Finger Art Factory, Inc. v. Dinicola*,
No. 2000 WL 145466 (S.D.N.Y. 2000) ..... 12

*Gaiman v. McFarlan*e,
360 F.3d 644 (7th Cir.2004) ..... 12

*Goldman v. Strough Real Estate, Inc.*,
770 N.Y.S.2d 94 (2d Dep't 2003) ..... 10

*In re Bayou Hedge Fund Litig.*,
534 F. Supp. 2d 405 (S.D.N.Y. 2007), *aff'd sub nom. S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98 (2d Cir. 2009) ..... 7

*In re UBS AG Sec.* Litig.,
2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012) (holding that plaintiff conceded issue through silence in opposition brief), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS A*G, 752 F.3d 173 (2d Cir. 2014) ..... 3

*Joseph v Fensterman*,
204 A.D.3d 766 (2d Dept 2022) ..... 9

*Kilkenny v. Law Office of Cushner & Garvey, L.L.P.*,
2012 WL 1638326 (S.D.N.Y. May 8, 2012) ..... 5

*Kirch v. Liberty Media Corp.*,
449 F.3d 388 (2d Cir. 2006)..... 15

*Kyusung Cho v. Youn Tae Yoo*,
2010 WL 2469969, (N.Y. Sup. Ct. June 2, 2010)..... 12

*Lanzi v Brooks*,
54 A.D.2d 1057 (3d Dep't 1976), *affd,* 43 N.Y.2d 778 (1977) ..... 10

*Latour v. Columbia University*,
12 F. Supp. 3d 658 (S.D.N.Y. March 31, 2014) ..... 13

*Lewinson v. Henry Holt & Co.*, LLC,
659 F. Supp. 2d 547 (S.D.N.Y. 2009)..... 12

*Lomax v New Broadcasting Co.*,
18 A.D.2d 229 (1st Dep't 1963) ..... 7

*Maor v. Blu Sand Int'l Inc.*,
143 A.D.3d 579 (1st Dep't 2016) ..... 15

*Marache v Akzo Nobel Coatings, Inc.*,
72 UCC Rep Serv 2d 559 (S.D.N.Y. Mar. 12, 2010), adhered to, 2010 WL 1629648 (S.D.N.Y. Apr. 21, 2010), report and recommendation adopted, WL 3731124 (S.D.N.Y. Sept. 7, 2010), and report and recommendation adopted, 2010 WL 3731124 (S.D.N.Y. Sept. 7, 2010) ..... 11

*Mueller v Michael Janssen Gallery Pte. Ltd.*,
225 F.Supp 3d 201 (S.D.N.Y. 2016)..... 14

*N. Shipping Funds I, LLC v. Icon Cap. Corp.*,
921 F. Supp. 2d 94 (S.D.N.Y. 2013)..... 11

*Perreca v. Gluck*,
295 F.3d 215 (2d Cir. 2002) ..... 12

*Raine v Lorimar Productions, Inc.*,
71 BR 450 (S.D.N.Y. 1987) ..... 15

*Satanic Temple, Inc. v Newsweek Mag. LLC*,
2023 WL 2403136 (S.D.N.Y. Mar. 8, 2023) ..... 14

*State St. Glob. Advisors Tr. Co. v Visbal*,
431 F Supp 3d 322 (S.D.N.Y. January 3, 2020) ..... 8

*Thor Properties, LLC v Willspring Holdings LLC*,
118 A.D.3d 505 (1st Dept 2014) ..... 2

*TufAmerica, Inc. v. Diamond*,
968 F.Supp.2d 588 (S.D.N.Y. 2013) ..... 2

*United Beer Distrib. Co., Inc. v. Hiram Walker (N.Y.) Inc.*,
163 A.D.2d 79 (1st Dep't 1990) ..... 7

*Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C.*,
455 F. App'x 102 (2d Cir. 2012) ..... 8

*Vigoda v DCA Productions Plus Inc.*,
293 AD2d 265 (1st Dep't 2002) ..... 9

*Vista Food Exch., Inc. v. Champion Foodservice, LLC*,
124 F.Supp.3d 301 (S.D.N.Y. 2015) ..... 15

*W. Bulk Carriers KS v. Centauri Shipping Ltd.*,
2013 WL 1385212 (S.D.N.Y. Mar. 11, 2013) ..... 3

*Wallace v. New York City Dep't of Corr.*,
1996 WL 586797 (E.D.N.Y. Oct. 9, 1996) ..... 5

*Yamashita v. Scholastic Inc.*,
936 F.3d 98 (2d Cir. 2019) ..... 13

*Zaitsec v. Solomon Bros.*,
60 F.3d 1001 (2d Cir. 1995) ..... 6

**Statutes**

§51 of the New York Civil Rights Law ..... 3, 7

**Rules**

N.Y. C.P.L.R. § 213(8) ..... 10

Defendants[1] submit this reply memorandum of law in further support of their motion to dismiss Plaintiff's TAC. Plaintiff has failed to demonstrate that he has pled any viable claims and as such, Defendants' motion should be granted in its entirety.

## I. THE TAC SHOULD BE DISMISSED UNDER THE PLAUSIBILITY STANDARD

Defendants do not "ignore the allegations that are in the TAC[2]." Defendants have shown that the allegations contained in the TAC, including the specific factual allegations that contradict Plaintiff's conclusory pleadings, are insufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v Twombly*, 550 US 544, 570, 127 S Ct 1955, 167 L Ed 2d 929 [2007]. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." However, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* "Contrary to Plaintiff's argument that relies on outdated pleading standards, Plaintiff is not excused from stating a plausible claim because he is *pro se*, nor is he allowed to rely on conclusory allegations that are clearly contradicted by the very documents he has attached to the TAC or his prior judicial admissions. The Court can and should disregard those allegations, and as set forth herein, should dismiss the TAC with prejudice.

## II. PLAINTIFF'S OPPOSITION DOES NOTHING TO SAVE HIS BREACH OF CONTRACT CLAIMS AGAINST DEFENDANTS

### A. Plaintiff Has Failed to Plausibly Allege an Agreement with Sarandon

That Sarandon received a print from Tsitoghdzyan is not indicative of a contract with or consideration from Plaintiff, as opposed to Tsitoghdzyan or David Shara, and as such Plaintiff has failed to adequately plead a valid agreement that he has standing to enforce. That Plaintiff allegedly

[1] Defined terms shall have the same meaning set forth in Defendants' moving papers, unless otherwise specified.
[2] Defendants focus was properly on the points where Plaintiff's allegations are absent and/or relate to Plaintiffs' failure to state a claim, which is the purpose of a motion to dismiss.

sent the email with four points, including offering the paintings and asking Sarandon to do PR for the Film does not make a contract between Plaintiff and Sarandon, as there was never an acceptance by Sarandon. Plaintiff's argument that Sarandon accepted is clearly contradicted by the email itself, which the Court must consider,[3] and the express statements of Sarandon indicate she was not accepting the terms proposed. TAC ¶98. After sending four bullet points, one of which was asking Sarandon to conduct PR for the film (TAC ¶98) Sarandon did not say yes, she said, "there's no way to know it that would be possible at this point, we'd just have to wait…" *Id*. In no way could saying she would have to wait be deemed an unequivocal acceptance, and to the contrary is clearly an indication that Sarandon could not agree at that time. *Thor Properties, LLC v Willspring Holdings LLC*, 118 A.D.3d 505 (1st Dept 2014) (To enter into a contract, a party must clearly and unequivocally accept the offeror's terms; if instead the offeree responds by conditioning acceptance on new or modified terms, that response constitutes both a rejection and a counteroffer which extinguishes the initial offer). It is clear by the documents attached to the Complaint that there was no unequivocal acceptance of the terms by Sarandon, and as such, there was never a valid contract between Plaintiff and Sarandon.

Moreover, in no event could the alleged agreement that Plaintiff claims was accepted by Sarandon, plausibly be seen to extend to Sarandon allegedly being obligated to provide a signed name, image, likeness release. This would be a material term and is entirely absent from the email Plaintiff relies upon. Plaintiff has failed to show any place in the TAC where Sarandon allegedly agreed in writing to sign a release for the use of her name, image and/or likeness. To the extent Plaintiff is relying on unpled oral promises, those too would fail. Plaintiff's opposition fails to

[3] *TufAmerica, Inc. v. Diamond*, 968 F.Supp.2d 588, 592 (S.D.N.Y. 2013)("If a document relied on in the complaint contradicts allegations in the complaint, the document, not the allegations, control, and the court need not accept the allegations in the complaint as true.").

address, and thus concedes, Defendants' argument[4] that such oral promises could not be enforceable in light of section §51 of the New York Civil Rights Law, which requires "written consent first obtained" and the statute of frauds. N.Y. Civil Rights Law §51; Defendants' moving papers, Sections I(B)(1) and V. Moreover, Plaintiff has failed to allege a meeting of the minds of consideration for these alleged oral promises. Accordingly, Plaintiff's breach of contract claim against Sarandon fails.

**B. Plaintiff's Contract Claims Against Shara Also Fail**

None of the arguments made by Plaintiff overcome Defendants' argument that the express terms of the Producer's Agreement provide that "[Plaintiff] cannot make any decision regarding distribution without contacting and getting written confirmation by [Shara]," and as such any failure to distribute the Film is not a breach of the Producer's Agreement, but instead Shara's right under the Producer's Agreement. Indeed, Plaintiff has not even addressed this or Defendants' argument that the Producer Agreement's integration clause and/or parole evidence rule bar evidence of prior negotiations argued by Defendants in Section I(B)(2) of their moving papers, and as such has conceded them. *Syniverse Techs., Inc.*, at *7.

Plaintiff's argument about the two invoices from 2019 entirely misses the point. As set forth in Defendant's moving papers, Plaintiff's allegations that Shara failed to pay various invoices for the Film, (TAC ¶¶217, 349, 358), fails to make out a plausible claim for breach, because the

[4] Numerous courts have held that a plaintiff's failure to address an issue in its opposition raised by its adversary amounts to a concession or waiver of the argument. *See, e.g., AT&T Corp. v. Syniverse Techs., Inc.*, 2014 WL 4412392, at *7 (S.D.N.Y. Sept. 8, 2014) (holding that the plaintiff's failure to address an issue in its opposition brief "concedes the point"); *W. Bulk Carriers KS v. Centauri Shipping Ltd.*, 2013 WL 1385212, at *3 (S.D.N.Y. Mar. 11, 2013) (holding that plaintiff conceded issue of subject matter jurisdiction by failing to address it in its opposition brief); *In re UBS AG Sec. Litig.*, 2012 WL 4471265, at *11 (S.D.N.Y. Sept. 28, 2012) (holding that plaintiff conceded issue through silence in opposition brief), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014); *Cole v Blackwell Fuller Music Publ., LLC*, (S.D.N.Y. Sept. 28, 2018) (As such, Plaintiff's silence in his opposition concedes Defendants' arguments concerning the Amended Complaint's failure to state a claim, and Plaintiff's claims are thus dismissed for that additional reason.)

Producer Agreement provided that Plaintiff was responsible for most costs. Producer Agreement, p.1 (Plaintiff will "pay all additional Color Correction and Editing of the film and other parts of the film yet to be filmed without further production cost hereto"). Despite attaching the two invoices he points to, Plaintiff has not pled that they were part of an approved budget by Shara (indeed they seem outside of the alleged approved Festival release budget TAC ¶147, which was only allegedly approved as a budget for the film festival circuit—not a theatrical release), that the services were performed and that they are owed, and as such there is no plausible inference that Shara was responsible for them (or other unspecified invoices).

Plaintiff also cannot enforce the Alleged Oral Agreement[5] by repeating that it was meant to last less than 12 months. First, Plaintiff's citation to the email referenced in the TAC, also does not overcome that Alleged Oral Agreement is barred by the statute of frauds. Tsitoghdzyan's email clearly says that "if you had a proper contract with producer, you will be in charge and penalized for 12 months late" refers to a financial penalty *after* being 12 months late and is not referring to the time frame for the performance of the entire Alleged Oral Agreement. TAC. ¶7 n. 4. More importantly, Plaintiff's allegations in the TAC show that the full performance of the Alleged Oral Agreement, including, distribution and payment of profits would be far beyond a year. *Id*. ¶182 n. 147 (Those invoices' content show they are related to elements of the distribution to theatres and o (sic) the distribution online, already mentioned and described previously, scheduled to end 2019 or beginning 2020); *Id*. ¶98 (…Plaintiff sent to Sarandon the business proposal approved of by Shara and Plaintiff. The email shows the terms offered: … a 10% of all profits generated by the movie in any platform…) New York courts have held that such continuing payments make the contract subject to the statute of frauds. ("Plaintiff's breach of contract claim for failure to pay

[5] It is unclear whether there was an oral agreement in 2016, as Plaintiff argues in his opposition that the agreement was "being shaped in 2016." Balder Opp., pp. 3 n. 7.

royalties involves an agreement incapable of being performed within one year."); *Andrews v. Sony/ATV Music Publ'g, LLC*, 2017 WL 770614, at *6 (S.D.N.Y. 2017) ("New York courts have specifically determined that open-ended oral agreements for the payment of royalties are subject to the Statute of Frauds.") (internal citations omitted).

Moreover, the express factual allegations that Plaintiff made in his Second Amended Complaint ("SAC"), which are judicial admissions against Plaintiff, further show that the Alleged Oral Agreement is barred by the statute of frauds. Plaintiff's allegations in the SAC that he anticipated finishing the Film by "mid-2017" and sometime thereafter would be "distributed commercially after an initial film festival run" (SAC ¶1) should be considered by the Court. Plaintiff specifically stated that a documentary like this should take "two years for its production and film festival run" (SAC ¶113) with distribution following that. Obligations extending to early 2016 to well past mid-2017, and with ongoing payments from any distribution contract after expenses were recouped, clearly contemplates that the relationship would last longer than a year, and thus is within the statue of frauds. In cases "where allegations in an amended pleading 'directly contradict' pleadings in the original complaint, courts have disregarded the amended pleading." *Brooks v. 1st Precinct Police Dep't*, 2014 WL 1875037, at *2 (E.D.N.Y. May 9, 2014) (citations omitted); *Kilkenny v. Law Office of Cushner & Garvey, L.L.P.*, 2012 WL 1638326, at *5 (S.D.N.Y. May 8, 2012) ("There is authority supporting the notion that a court may disregard amended pleadings when they directly contradict facts that have been alleged in prior pleadings.");[6] *Wallace*

[6] Defendants also reject Plaintiff's implication that Defendants requested relief under Rule 11 or that any arguments could or should be struck. Defendants note that Plaintiff's self-contradictory allegations violate Rule 11(b)(3) was not a request for sanctions under Rule 11, but instead is an independent reason for the Court to deny consideration of newly concocted allegations that are contradicted by Plaintiff's other specific factual allegations, which is proper for the Court to consider. The Court can on its own accord issue sanctions *sua sponte* after allowing Plaintiff to show cause if it so chooses, the basis for removing Plaintiff's prior admissions that the project would take at least two years, which were clearly made to avoid the statute of frauds defense. However as set forth herein, the Court can accept the prior allegations as true regardless.

*v. New York City Dep't of Corr.*, 1996 WL 586797, at *2 (E.D.N.Y. Oct. 9, 1996) (Where a "plaintiff blatantly changes his statement of the facts in order to respond to the defendant['s] motion to dismiss ... [and] directly contradicts the facts set forth in his original complaint," a court is authorized "to accept the facts described in the original complaint as true."). Here, where Plaintiff has blatantly changed his factual allegations to avoid a statute of frauds issue, the Court is authorized to accept his specific factual allegations from the SAC as true.

Plaintiff's arguments regarding duress and coercion also do not help him. Coercion and duress are defenses to a breach of contract claim—and here Plaintiff is seemingly trying to enforce the Producer's Agreement. As such, duress and coercion does not help him enforce his claim for breach of contract. Moreover, the arguments in Plaintiff's Opposition that Plaintiff was coerced to accept a painting as compensation instead of up-front compensation is directly contradicted by Plaintiff's other allegations where he said he would "…prefer to have an original painting as a reward than just being paid." TAC ¶20. Indeed, Plaintiff does not plead that even under any other agreement he would have been entitled to upfront cash compensation, thus there was no duress. Additionally, allegedly telling Plaintiff that "the project will be scrap [sic]," "the film is dead in the water," and "I am tempted to start all over again with someone else," are not threats that fail to rise to the level of duress. "[A] mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress." *Austin Instrument, Inc. v Loral Corp.,* 29 N.Y.2d 124, 130 (1971). Based upon the foregoing, Plaintiff has not adequately pled duress or coercion.

Moreover, Plaintiff's argument that Shara did not have the right to terminate the Alleged Oral Agreement further demonstrates that the Alleged Oral Agreement is barred by the statute of frauds. *Zaitsec v. Solomon Bros.*, 60 F.3d 1001, 1003 (2d Cir. 1995) ("if performance within one

year depends upon an act solely within the control of the party seeking to enforce the oral agreement, the Statute of Frauds remains applicable.") Plaintiff has failed to adequately allege a breach of the Producer's Agreement and as such this claim must be dismissed.

**C. Plaintiff's Contract Claim Against Tigran Also Fails**

Plaintiff admits that the Producer's Agreement does not govern a contractual relationship between Plaintiff and Tigran, and then fails to identify a different agreement between the parties. To the extent that Plaintiff is alleging a contract based on Tigran's alleged oral promise to provide talent releases, this argument fails. As discussed in Section I(B)(1) in Defendants' moving papers, the statute of frauds renders the alleged oral agreement by Tsitoghdzyan unenforceable[7]. Plaintiff's opposition fails to make any arguments that would dispute that this alleged oral agreement was not for an indefinite amount of time[8], much less that it would be completed in less than 12 months. As such, this oral agreement for an indefinite amount of time is unenforceable.

Tsitoghdzyan's alleged oral promise to get his wife's and son's talent releases signed also fails to make the alleged oral agreement enforceable. As discussed in Section V in Defendants' moving papers, Tsitoghdzyan's wife and son have the right to control the use of their name, portrait, picture and voice under N.Y. Civil Rights Law §51[9], and at no point did they contract that right away. *Brinkley v. Casablancas*, 80 A.D.2d 428, 434 (1st Dep't 1981)("Oral consent is not a defense")(*citing Lomax v New Broadcasting Co*., 18 A.D.2d 229 (1st Dep't 1963)). Plaintiff's argument is futile, and Plaintiff has failed to allege breach of contract against Tsitoghdzyan.

---

[7] This is another instance where Plaintiff does not address Defendants' argument, and therefore concedes it. *Syniverse Techs., Inc.*, at *7.

[8] Contracts of indefinite duration are also deemed to be incapable of being performed within a year, and thus fall within the ambit of the Statute of Frauds." *In re Bayou Hedge Fund Litig*., 534 F. Supp. 2d 405, 419 (S.D.N.Y. 2007), *aff'd sub nom. S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98 (2d Cir. 2009)(*citing Computech Intern., Inc. v. Compaq Computer Corp*., 2002 WL 31398933, at *3 (S.D.N.Y. 2002); *United Beer Distrib. Co., Inc. v. Hiram Walker (N.Y.) Inc*., 163 A.D.2d 79 (1st Dep't 1990)).

[9] This is another instance where Plaintiff does not address Defendants' argument, and therefore concedes it. *Syniverse Techs., Inc.*, at *7.

## III. PLAINTIFF HAS FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS

As an initial matter, for reasons previously discussed both in this reply in section I(A), *supra*, and the Defendants' moving papers, Shara has not breached the Producer's Agreement in any way. As such, Plaintiff cannot establish the fourth element of his tortious interference with contract claim, which is that there be an "actual breach of contract." *Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C.,* 455 F. App'x 102, 104 (2d Cir. 2012).

Plaintiff has also failed to sufficiently allege his tortious interference claim relating to the alleged agreement between himself and Mark Petrie ("Petrie"). Plaintiff did not plead tortious interference with contract against Shara yet concedes that Shara is the only defendant who knew about the alleged agreement with Petrie and that the remaining Defendants did not have knowledge of the alleged agreement with Petrie (TAC ¶83), which is a required element of tortious interference of a contract. *State St. Glob. Advisors Tr. Co. v Visbal*, 431 F Supp 3d 322 (S.D.N.Y. January 3, 2020) (To plead the second element of a tortious interference with contract claim under New York law—that the alleged interferer had knowledge of the contract in question—claim proponent must plausibly allege that the alleged interferer had actual knowledge of the terms of the contract and of the contractual obligation that was allegedly breached.)

Plaintiff also fails to allege any damages that he incurred as a result of the alleged breach of the agreement with Petrie, and as such another required element of his tortious interference claim is not pled. Plaintiff cannot plead Petrie's alleged damages, which is exactly what Plaintiff tries to do in the TAC ¶376 when he seeks to have the Court "Order Defendants to compensate Mark Petrie for the damages created…". Plaintiff is not trying to recover damages on his own behalf for the alleged breach of the agreement between himself and Petrie. Plaintiff's failure to allege knowledge of the contract and damages, necessary elements of a tortious interference claim,

are fatal to Plaintiff's claim for tortious interference with a contract, which must be dismissed.

Plaintiff also did not specifically allege any potential contracts to sufficiently plead his tortious interference claim. Instead, Plaintiff argued that he "had conversations with Blood Sweat Honey because they wanted to represent the film." This argument fails to identify the relevant terms of a contract, or any prospective contract with Blood Sweat Honey. Accordingly, Plaintiff has failed to plead tortious interference of contract. It is not enough to describe the contract in general terms, though; "[i]t is imperative that, in bringing a tortious interference claim, a plaintiff identify 'the relevant terms of the contract [] that existed' that were breached by defendant." *Alvarado v. Mount Pleasant Cottage Sch. Dist.*, 404 F.Supp.3d 763, 791 (S.D.N.Y. 2019).

Plaintiff's arguments in his opposition concerning his tortious interference of business relations claim equally fail. Plaintiff fails to allege any conduct that Defendants directed towards MAD Solutions or Blood Sweat Honey that interfered with the negotiations, which is a necessary element of the claim. *Joseph v Fensterman*, 204 A.D.3d 766, 771 (2d Dept 2022) ("Conduct constituting tortious interference with business relations is, "by definition, conduct directed not at the plaintiff ... but at the party with which the plaintiff has or seeks to have a relationship"). Plaintiff also fails to allege that but for Defendants' conduct, any potential contract would have been entered into by the Plaintiff, and as such, the tortious interference claim fails. *Vigoda v DCA Productions Plus Inc.*, 293 AD2d 265 (1st Dep't 2002) (Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct.). Plaintiff's tortious interference claims must be dismissed.

## IV. PLAINTIFF STILL FAILS TO SUFFICIENTLY ALLEGE FRAUD

The allegations that auction records in 2014 or 2015 were a "fraud" orchestrated by Shara and Tsitoghdzyan in 2014 and 2015 are insufficient to plausibly support Plaintiff's fraud claim.

Plaintiff's conclusory allegations that Shara and Tsitoghdzyan somehow manipulated the auction to get a higher price for the paintings are insufficient and irrelevant, as Plaintiff does not allege that the value of the Paintings, which were represented by Phillips online since 2014, were fraudulent, only that the prices the paintings actually sold at auction were increased. Nowhere in the TAC does Plaintiff allege that the value of the paintings given by Phillips on their website was fraudulent. As such, Plaintiff could have relied on those values as early as 2014, when they were posted online. Therefore, Plaintiff cannot rely on the August 2020 date when arguing that his fraud claim is not barred by the 6-year statute of limitations on fraud. N.Y. C.P.L.R. § 213(8).

Plaintiff's opposition relies on the argument that "Shara kept raising the representations of value of the paintings…" and that "the TAC shows Shara's and Tigran's representations of value as regards to Tigran's paintings grow…" However, as set forth in Defendants' moving papers, allegations that Defendants speculated about what they thought might happen in the future, cannot support an action for fraud since it is not a statement of fact. *Lanzi v Brooks*, 54 A.D.2d 1057, 1058 (3d Dep't 1976), *affd,* 43 N.Y.2d 778 (1977)(alleged statement that they would be higher in a few years, is not a statement of existing fact that is capable of fraud)(*citing Banner v. Lyon & Healy, Inc*., 249 AD 569, *affd*, 277 N.Y. 570 (1938)); *Goldman v. Strough Real Estate, Inc.,* 770 N.Y.S.2d 94, 95 (2d Dep't 2003)("representation pertaining to the future development of the adjoining parcel did not amount to the perpetration of fraud). Further, Plaintiff still does not make factual allegations that the statements regarding the past or current values were actually false. As such, a required element of fraud is missing. Therefore, Plaintiff's fraud claim must be dismissed.[10]

Plaintiff's argument regarding the implied warranty of fitness for a particular purpose also

[10] Despite Plaintiff's argument in his opposition, the Price of the painting is not specified. Pursuant to the Producer's Agreement, "[Plaintiff] agrees that [the painting] will be a painting of the series 'Mirrors', portraying his wife, Bella Jazminde la Guia, no later than the last day of the month of May of the year 2017, and that the painting will be 75x50 inches." The price of the painting is not mentioned at all.

fails. "[u]nder a theory of ... breach of implied warranty of fitness for a particular purpose, the inquiry is focused on consumer expectations when the product 'was being used for the purpose and in the manner intended.'" *Marache v Akzo Nobel Coatings, Inc.*, 72 UCC Rep Serv 2d 559 (S.D.N.Y. Mar. 12, 2010), adhered to, 2010 WL 1629648 (S.D.N.Y. Apr. 21, 2010), report and recommendation adopted, WL 3731124 (S.D.N.Y. Sept. 7, 2010), and report and recommendation adopted, 2010 WL 3731124 (S.D.N.Y. Sept. 7, 2010) (internal citations omitted). This is unlike the fish example, as art can be received for many purposes. Plaintiff has no argument for a breach of the implied warranty of fitness for a particular purpose against Defendants and this would be superseded by the specifications in the Producer's Agreement.

## V. PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE BREACH OF FIDUCIARY DUTY

Plaintiff's argument that his breach of fiduciary duty claim is not duplicative fails to address the most important aspect of Defendants' claim i.e., that no facts were pled, let alone extraordinary circumstances, which would allow the Court to plausibly infer the existence of a fiduciary relationship with Shara. Plaintiff's self-serving conclusory allegation that Shara and Plaintiff had "a mutual [fiduciary] duty" is not sufficient. TAC ¶18. It is precisely this type of self-serving conclusory recital of an element of a claim that is not entitled to a presumption of truth, and which must be disregarded. *N. Shipping Funds I, LLC v. Icon Cap. Corp.*, 921 F. Supp. 2d 94, 101 (S.D.N.Y. 2013). As such, Plaintiff's breach of fiduciary duty claim fails.

## VI. PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE PROMISSORY ESTOPPEL

Despite knowing that allegations of oral promises alone are insufficient, Plaintiff has failed to address this issue in his opposition, other than a conclusory sentence that "There is much more than simple oral evidence supporting the existence of the promises, as TAC unambiguously shows,) without citing to even a single instance in the TAC. As such, Plaintiff concedes the

argument. *Syniverse Techs., Inc.*, at *7. Plaintiff's opposition only addresses whether the promissory estoppel claim is duplicative of his breach of contract claim. A claim for promissory estoppel is precluded where the plaintiffs "do not point to any promise separate and apart from the obligations under the contract" because promissory estoppel is "designed to provide a remedy in the absence of a contractual obligation." *Kyusung Cho v. Youn Tae Yoo*, 2010 WL 2469969, (N.Y. Sup. Ct. June 2, 2010); *Four Finger Art Factory, Inc. v. Dinicola*, No. 2000 WL 145466, *8 (S.D.N.Y. 2000). However, Plaintiff ignores the fact that he argues that Defendants are in breach of contract for the very same conduct that he relies on in his promissory estoppel claim. As such, he cannot now point to promises outside of any alleged agreement. TAC 259 ([Sarandon] imposes a condition to give her release, in spite of her breach of contract and promissory estoppel…).

Regardless, there must be more than simply oral evidence to support a plaintiff's promissory estoppel claim. *Perreca v. Gluck,* 295 F.3d 215, 225 (2d Cir. 2002). Plaintiff's TAC still only contains conclusory allegations about Shara, Sarandon and Tsitoghdzyan failing to fulfill the oral promises to provide "any signed paperwork necessary," which is insufficient to support his promissory estoppel claim. TAC ¶¶, 60, 340, 389. Especially where the talent releases must be in writing. As such, Plaintiff's promissory estoppel claim should be dismissed.

## VII. PLAINTIFF FAILS TO ALLEGE COPYRIGHT INFRINGEMENT

Plaintiff's opposition argues this his nurse character from "Viper Club" focuses on children, even if he had pled this in his TAC, this still fails to create a plausible inference that they are substantially similar, as required for an infringement claim. A common idea of a nurse in an emergency room working with children is the definition of what is intended to be unprotectable under the scènes à faire doctrine, and as such, Plaintiff's copyright infringement claim fails. *Lewinson v. Henry Holt & Co*., LLC, 659 F. Supp. 2d 547, 567 (S.D.N.Y. 2009)(*citing Gaiman v. McFarlan*e, 360 F.3d 644, 659 (7th Cir.2004)("A stock character is a stock example of the

operation of the [scènes à faire] doctrine...."). Plaintiff has also failed to address Defendants' argument that Plaintiff failed to allege that Sarandon committed an act of infringement by allegedly playing a nurse, where she is not alleged to have written the screenplay or distributed the film. Plaintiff has failed to allege how Sarandon allegedly violated one of the exclusive rights provided under the Copyright Act. As such Plaintiff concedes the argument. *Syniverse Techs., Inc.*, at *7.

Plaintiff has also failed to plead that the scope of the alleged license with Honey Shara was exceeded, as such this claim must be dismissed. *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 105 (2d Cir. 2019) (Where the existence of a license is not in question, "a copyright holder must plausibly allege that the defendant exceeded particular terms of the license" to state a viable claim); *Latour v. Columbia University*, 12 F. Supp. 3d 658, 663 (S.D.N.Y. March 31, 2014) (dismissing copyright infringement claim on the pleadings where plaintiff had provided a non-exclusive license to the work purportedly infringed). Plaintiff alleges that he provided her with a copy for the purpose of her sending a copy of the Film to her "friend"—which Plaintiff seemingly alleges that she did. TAC, ¶358. That Honey Shara allegedly sent the Film to her friend Tsitoghdzyan does not exceed the scope of the alleged license.

Finally, with respect to the "text" Plaintiff claims Tsitoghdzyan allegedly infringed upon, Plaintiff has still failed to provide Defendants with the adequate notice needed to sufficiently plead a copyright infringement claim. TAC ¶352. Plaintiff's opposition has still failed to identify what "text" he is referring to, how it was used, or the time frame infringed. As such, Plaintiff's copyright infringement claims should be dismissed.

## VIII. PLAINTIFF STILL FAILS TO SUFFICIENTLY ALLEGE DEFAMATION

The TAC is utterly devoid of any alleged statements that could be considered to be defamatory, let alone defamatory against the Plaintiff. Tsitoghdzyan and Shara saying to the press in 2017 that the Film would be distributed (TAC, ¶¶108, 351) is not defamatory, is not a statement

of existing fact that is capable of truth or falsity nor is it about Plaintiff.

Tsitoghdzyan allegedly stating in a July 25, 2019, interview that the Film's screening was cancelled because Plaintiff took the Film out of the screenings completely (TAC, ¶¶191, 350) is also not defamatory, where Plaintiff himself admits that he did in fact cancel the screening along with Shara, and therefore the alleged statement is not false. TAC, ¶191. Shara stating that he is a producer of the movie instead of an executive producer in a February 18, 2019, television interview (TAC, ¶¶333, 336) is also not a defamatory statement, nor is it about plaintiff. Moreover, Plaintiff's defamation claim should be dismissed the alleged statements were allegedly made prior to or in 2019 and are therefore barred by the one-year statute of limitations.

Sarandon's email that "I don't have anything positive to say about the film" is not slanderous. The statement was made to Plaintiff (not a third party) and was Sarandon's opinion and therefore protected. *Satanic Temple, Inc. v Newsweek Mag. LLC*, 2023 WL 2403136 (S.D.N.Y. Mar. 8, 2023) (Under New York law, expressions of an opinion false or not, libelous or not, are constitutionally protected and may not be the subject of private damages actions.). It is also barred by the statute of limitations. Plaintiff's opposition has utterly failed to establish even a single defamatory statement, and as such, Plaintiff's defamation claim should be dismissed.

## IX. PLAINTIFF FAILS TO SUFFICIENTLY ALLEGE UNJUST ENRICHMENT

Plaintiff has failed to address and thus concedes that, Plaintiff allegedly being unable to distribute the Film, is expressly covered by the Producer Agreement, and as such unjust enrichment is barred as a matter of law. Plaintiff explicitly contracted all rights to the distribution of the Film in the Producer Agreement. TAC, Ex. 7. As such, Plaintiff cannot bring an unjust enrichment claim against Shara or the Remaining Defendants, as an unjust enrichment claim is barred "if there is a valid contract governing the subject matter of the dispute, **even if one of the parties to the claim is not a party to that contract**." *Mueller v Michael Janssen Gallery Pte. Ltd*., 225 F.Supp

3d 201, 207 (S.D.N.Y. 2016)(*citing Vista Food Exch., Inc. v. Champion Foodservice, LLC*, 124 F.Supp.3d 301, 312 (S.D.N.Y. 2015)(emphasis added); *Maor v. Blu Sand Int'l Inc.*, 143 A.D.3d 579 (1st Dep't 2016)(barring unjust enrichment claim because "there can be no quasi-contract claim against a third-party nonsignatory to a contract that covers the subject matter of the claim")).

## X. PLAINTIFF STILL FAILS TO SUFFICIENTLY ALLEGE CIVIL CONSPIRACY

As the moving papers and instant reply show, Plaintiff's claims utterly fail, and as such, so too must Plaintiff's lone remaining claim for civil conspiracy, as "New York does not recognize an independent tort of conspiracy." *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 401 (2d Cir. 2006). Even if the breach claim were to survive in some part, this claim must fail as there is no claim for conspiracy to breach a contract. *Raine v Lorimar Productions, Inc.*, 71 BR 450, 453-54 (S.D.N.Y. 1987)(It is well established under New York law that no cause of action by a party to a contract will lie for conspiracy to breach the contract).

## XI. PLAINTIFF STILL FAILS TO ESTABLISH THAT THE TAC SHOULD NOT BE DISMISSED WITH PREJUDICE

Plaintiff has now had three chances to amend his complaint as well as oppose the Defendants' motion, and yet Plaintiff still fails to sufficiently allege any claim. The Court already informed Plaintiff that a fourth amendment would not be granted absent extraordinary circumstances [Dkt. No. 61], which Plaintiff has not shown. As such, Plaintiff should not be given further leave to amend.

## CONCLUSION[11]

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Third Amended Complaint with prejudice, and for such other relief as is just and proper.

[11]Plaintiff's requests for sanctions are equally as specious nor ahs Plaintiff made a proper request for same. As such his requests for sanctions must be denied.

Dated: New York, New York
May 1, 2023

Respectfully submitted,
ADELMAN MATZ P.C.

By: _____

Sarah M. Matz, Esq.
Gary Adelman, Esq.
Barry M. Golden, Esq.
1173A Second Avenue, Suite 153
New York, New York 10065
Tel: (646) 650-2207
Email: sarah@adelmanmatz.com
Email: g@adelmanmatz.com
Email: bgolden@adelmanmatz.com
*Attorneys for Defendants*